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THE PARENTAL KIDNAPPING PREVENTION ACT: CONSTITUTIONALITY AND EFFECTIVENESS

For years, the law has done little to prevent parents facing unfavorable child custody decrees from abducting their children and taking them across state lines. This Note asserts that the law has actually encouraged this practice because traditional requirements for personal jurisdiction permit more than one state to determine custody of the children. In addition, state courts refuse to recognize the child custody decrees of sister states and often issue conflicting decrees favoring the abducting parent. Congress recently attempted to remedy the problem by passing the Parental Kidnapping Prevention Act. The PKPA imposes uniform personal jurisdiction requirements upon the states which permit only one state to determine child custody, and it requires state courts to recognize the child custody decrees of other states. This Note concludes that the PKPA is a constitutionally permissible exercise of congressional power which will eliminate the court-imposed impediments to reducing interstate child abductions.

INTRODUCTION

INTERSTATE CHILD abduction by parents facing divorce or separation has been an unchecked and serious domestic relations problem.¹ A child's welfare is jeopardized by any unstable custody arrangement, and catastrophic consequences are a likely result of the child's abduction by one parent from the other.² Although the courts strive to ensure the child's best interests,³ the

1. See, e.g., Note, *Prevention of Child Stealing: The Need for a National Policy*, 11 LOY. L.A.L. REV. 829, 830 (1978); Gardner, *Missing Children: New Laws Sought*, N.Y. Times, Sept. 12, 1982, § XI, at 4, col. 5; Gardner, *Missing Children: A Legal Thicket*, N.Y. Times, Sept. 5, 1982, § XI, at 1, col. 1; Wels, *New York's Default on 'Child-Napping'*, N.Y. Times, Feb. 13, 1981, at 26, col. 6 (letter to the editor).

2. H. CLARKE, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 326 (1968). Emphasizing the detrimental effects child custody can have on children, Clark states:

One of the things that the child's welfare certainly demands is stability and regularity. If he is continually being transferred from one parent to the other by conflicting court decrees, he may be a great deal worse off than if left with one parent, even though as an original proposition some better provision could have been made for him. The necessary stability can only be achieved by a great respect on the part of the courts for existing custody decrees, and a lessening of their tendency to assume that their own disposition of a case is preferable to another's. Not only will this insure greater adherence to decrees by the courts of other states, but it will discourage parents from attempting to relitigate their custody disputes, and from using their child as a weapon for hurting each other.

Id.

3. See Bodenheimer, *The UCCJA: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1210-11 (1969) (citing *Ford v. Ford*, 371 U.S.

current legal framework does little to ameliorate the problem,⁴ because state courts do not give full faith and credit to custody orders of other states.⁵ The resulting availability of random and conflicting custody orders makes interstate child abduction less hazardous—and may indeed encourage it. A parent receiving an unfavorable custody decree in one state may take an abducted child across state lines hoping to obtain a favorable decree in another state. A new federal law mandating strict jurisdictional standards, however, will reduce interstate parental child abductions by severely limiting a state's power to issue a conflicting custody order.⁶

Until recently, reducing interstate child abductions by eliminating conflicting child custody orders has been a difficult task, because such orders are not final decisions entitled to full faith and credit.⁷ Initially, states applied the comity doctrine⁸ in an effort to minimize the fluid nature of child custody decrees, but the

187, 193 (1962); Kovacs v. Brewer, 356 U.S. 604, 608 (1958)); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55 (1969) (discussion of psychological best interests of the child test).

4. See *infra* notes 23-38 and accompanying text; see also Hazard, May v. Anderson: *Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959) (analysis of destructive effects upon family law, special protection of neglected children, and social control of juvenile delinquency caused by Supreme Court's prohibiting enforcement of Wisconsin custody decree by Ohio court).

5. See *infra* notes 23-35 and accompanying text.

6. See *infra* notes 61-64 and accompanying text.

7. Foster & Freed, *Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdictional Act*, 28 HASTINGS L.J. 1011 (1977). Noting the leniency given to child custody modification, the authors state:

Although the full faith and credit clause of the Constitution mandates interstate recognition of sister state decrees, and has no proviso limiting its operation to "final" decrees, a condition of finality has nonetheless been judicially imposed. Decrees and orders relating to child custody and visitation (and also child support) are invariably subject to modification owing to a change of circumstances and hence are nonfinal in that sense. Moreover, since the first forum may modify, it is permissible for a second forum to do so without violating any full faith and credit obligation.

Id. at 1012-13.

8. See, e.g., *Bergen v. Bergen*, 439 F.2d 1008 (3d Cir. 1971) (principles of comity applied in custody determination); *Beebe v. Chavez*, 226 Kan. 591, 602 P.2d 1279 (1979) (court refused to modify custody determination because of comity); *Walden v. Johnson*, 417 S.W.2d 220 (Ky. 1967) (doctrine of comity applied to enforce child custody decree); *Bachelor v. District Court of Creek County*, 593 P.2d 84 (Okla. 1978) (child custody decree enforced on a matter of comity). "Comity" is defined as:

Courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and goodwill. . . . In general, principle of "comity" is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect.

BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

doctrine was not uniformly applied by the states.⁹ The dilemma intensified because the Supreme Court refused to decide whether child custody orders are entitled to full faith and credit under the United States Constitution.¹⁰

Recently, the Uniform Child Custody Jurisdiction Act (UCCJA)¹¹ was offered as a response to the Supreme Court's failure to provide workable guidelines, but it has not proven to be completely effective.¹² Congress' latest response to the recognized need for a comprehensive, national solution is the Parental Kidnapping Prevention Act (PKPA).¹³

This Note analyzes the PKPA, beginning with a discussion of the developments which led to the recognition that national legislation was needed to combat parental child abductions.¹⁴ This discussion includes a summary of the current Supreme Court position,¹⁵ an overview of the Uniform Child Custody Jurisdiction Act,¹⁶ the specific legislative history of the PKPA,¹⁷ and a description of the Act as passed.¹⁸ The Note then considers whether the PKPA is a constitutionally permissible exercise of Congress' power under the commerce clause and under section 5 of the fourteenth amendment.¹⁹ Finally, the Note evaluates the Act's effectiveness in deterring interstate child abductions by applying the principles of the Act to past Supreme Court cases dealing with

9. See, e.g., *Helton v. Crawley*, 241 Iowa 246, 41 N.W.2d 60 (1950) (doctrine of comity not applicable to child custody determination); *In re Stockman*, 71 Mich. 180, 38 N.W. 876 (1888) (comity not considered in custody determination); *People ex rel. Van Dyk v. Van Dyk*, 33 N.Y.S.2d 766 (Sup. Ct. 1942) (doctrine of comity not applied in child custody case); *In re Price*, 528 P.2d 1107 (Okla. 1974) (doctrine of comity not applicable to child custody determination). In each of these cases, the court did not apply comity principles because the child's circumstances changed after the original custody decree was rendered. These cases underscore the basic problem with using the comity doctrine. The comity doctrine does not obligate the states to recognize foreign state laws and judicial decisions. Comity, therefore, is subject to case-by-case application—a method inherently subjective and disjointed.

10. See *infra* notes 21–22 and accompanying text.

11. UNIF. CHILD CUSTODY JURISDICTION ACT, § 9 U.L.A. 111 (1979).

12. See *infra* notes 175–76 and accompanying text.

13. Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96–611, §§ 6–10, 94 Stat. 3568–73 (codified at 18 U.S.C. § 1073, 28 U.S.C. § 1738A, 42 U.S.C. §§ 654, 655, 663 (Supp. IV 1980)); see *infra* notes 46–70 and accompanying text.

14. See *infra* notes 21–45 and accompanying text.

15. See *infra* notes 21–35 and accompanying text.

16. See *infra* notes 36–45 and accompanying text.

17. See *infra* notes 46–59 and accompanying text.

18. See *infra* notes 60–71 and accompanying text.

19. See *infra* notes 72–146 and accompanying text.

child custody disputes.²⁰

I. PKPA: HISTORY AND MOTIVATION

The Supreme Court has been reluctant to decide whether the full faith and credit clause constitutionally applies to child custody orders.²¹ But neither has the Court expressly held that child custody orders are not entitled to full faith and credit.²²

In *Halvey v. Halvey*,²³ the Court initially considered the effect which a state must give to a child custody order of another state, and concluded that res judicata does not apply to a custody decree despite an apparent constitutional mandate of full faith and credit.²⁴ The Court held that any foreign state may modify a custody decree to the same extent that a rendering state may do so, if the foreign state possesses the requisite jurisdiction.²⁵ This decision marked the beginning of the Court's continuing effort to reconcile child custody orders with notions of res judicata and personal jurisdiction.

When confronted with the issue of personal jurisdiction in *May v. Anderson*,²⁶ the Supreme Court held that a custody decree is invalid unless the rendering court has personal jurisdiction over both parents. In *May*, the Court determined that a Wisconsin custody decree obtained by the husband could not be enforced because the wife and children were living in Ohio.²⁷ *May v. Anderson* has been criticized because the strict in personam jurisdiction requirement encourages parental abduction,²⁸ while ignoring the impact custody battles have on children.²⁹

Five years later, in *Kovacs v. Brewer*,³⁰ the Court held that a state court need not give res judicata effect to the original foreign state custody decree when changed circumstances necessitate modification.³¹ The case was remanded solely to determine

20. See *infra* notes 147-81 and accompanying text.

21. Frank, *The End of Legal Kidnapping in Pennsylvania: The Development of a Decided Public Policy*, 25 VILL. L. REV. 784, 796 (1980).

22. *Id.*; UNIF. CHILD CUSTODY JURISDICTION ACT, Commissioners' Prefatory Note, 9 U.L.A. at 112 (1979).

23. 330 U.S. 610 (1947).

24. *Id.* at 615.

25. *Id.* at 614.

26. 345 U.S. 528 (1953).

27. *Id.* at 528-29.

28. See Hazard, *supra* note 4.

29. See H. CLARKE, *supra* note 2, at 324; *supra* text accompanying note 2.

30. 356 U.S. 604 (1958).

31. *Id.* at 608.

whether a change in circumstances had actually occurred. The Court again failed to give child custody orders the apparent constitutionally mandated full faith and credit.

Finally, in *Ford v. Ford*,³² the Court held that even if the full faith and credit clause is applicable to child custody cases, a state court is not bound by a foreign state court's dismissal of a custody dispute, if the dismissal was not a final decision in the rendering state.³³ Emphasizing again that the children's best interests are paramount,³⁴ the Court stated that the trial judge's failure to review the custody agreement prevents a final dismissal.³⁵

The Supreme Court thus has not provided concrete guidelines for states to use in determining the effect to be given to a valid custody order rendered by another state. The Court's failure to recognize the need for full faith and credit makes such orders practically ineffective.

The Supreme Court's inaction has prompted commentators to emphasize the need for uniform state action.³⁶ The Uniform Child Custody Jurisdiction Act (UCCJA)³⁷ was drafted to meet that need. The National Conference of Commissioners on Uniform State Laws noted that the UCCJA's enactment was a response to the Supreme Court's failure to settle the question of full faith and credit applicability to custody decrees.³⁸

The conceptual basis of the UCCJA is Professor Ratner's "established home principle" of custody jurisdiction.³⁹ The established home principle confines child custody jurisdiction to one

32. 371 U.S. 187 (1962).

33. *Id.* at 192.

34. *Id.* at 193.

35. *Id.* at 194.

36. See, e.g., Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495 (1975); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953) (uniform policy will reduce unending litigation of interstate child custody issues and allow for clearer and more predictable decisions).

37. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111 (1979).

38. *Id.*, Commissioners' Prefatory Note, 9 U.L.A. at 112. The UCCJA's legal purpose is to create uniform exercise of state child custody jurisdiction in the absence of Supreme Court action mandating full faith and credit for child custody decrees. *Id.* at 114. The Commissioners, however, also acknowledge that the UCCJA serves a humanitarian function. The UCCJA's prefatory remarks clearly recognize that children caught within custody battles are deprived of security and stability deemed essential to their emotional growth and future well-being. *Id.* at 112. The Commissioners hoped that the UCCJA would eliminate the tragic consequences of parental child abductions. See *id.* at 113-14.

39. See Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964). The established home principle bases custody jurisdiction on the child's relationship with the state. Proper jurisdiction exists only if the child has been physically present in the state for

state,⁴⁰ the goal being to make custody orders less indecisive and uncertain.⁴¹

Although the UCCJA generated considerable optimism, it did not produce a comprehensive solution.⁴² It has been criticized for the lack of effective sanctions to enforce the Act if it is violated.⁴³ Criticism also focuses upon judicial interpretations expanding opportunities for jurisdiction in more than one state.⁴⁴ Finally, the Act does not contain any means to locate an abducting parent or punish such people to deter future violations.⁴⁵ Recent efforts, therefore, have focused upon resolving interstate custody disputes through federal legislation.

The first federal legislative attempt to mandate full faith and credit to child custody orders was introduced in the House of Representatives, and passed as a rider to the Domestic Violence Prevention and Services Act of 1980.⁴⁶ In the Senate, an amendment

a minimum period of time. The child's physical presence gives the state both control over and an interest in the child's welfare. *Id.* at 815-23.

40. Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and a Proposed Uniform Act*, 38 So. CAL. L. REV. 183 (1965). Ratner's theory contrasts with the multijurisdictional approach advanced by Professor Currie. The multijurisdictional approach permits concurrent state jurisdiction because the child's domicile, the child's presence in the state, and personal jurisdiction over the parents serve as alternative jurisdictional bases. See *Sampsell v. Superior Court*, 32 Cal. 2d 763, 780, 197 P.2d 739, 750 (1948).

Although Professor Currie envisions a different solution to child custody problems than Ratner, he also views the Supreme Court position as unfavorable. See Currie, *Full Faith and Credit Chiefly to Judgments: A Role for Congress* 1964 SUP. CT. REV. 89, 115.

41. Ratner criticizes the multijurisdictional approach by emphasizing the utility of the single jurisdictional approach to child custody orders:

A state where the defendant is domiciled, resident or personally served may make or modify a custody decree. A decree may also be modified by a state requested to enforce it and perhaps by the state that initially made it. The protection afforded a custody decree by the full faith and credit clause is uncertain. Ratner, *supra* note 39, at 807.

42. Foster & Freed, *supra* note 7; Hudak, *Seize, Run, and Sue: The Ignominy of Interstate Child Custody Litigation in American Courts*, 39 MO. L. REV. 521, 542-47 (1974); Note, *supra* note 1. One previous problem was that the UCCJA's effectiveness depended upon the number of states that adopted it. See UNIF. CHILD CUSTODY JURISDICTION ACT, Commissioners' Prefatory Note, 9 U.L.A. at 114; Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAM. L.Q. 304 (1969); Fleck, *Child Snatching by Parents: What Legal Remedies for "Flea and Plea"?*, 55 CHI.-KENT L. REV. 303, 309 (1979). That problem seems to have been resolved since 48 states have now adopted the UCCJA. See P. HOFF, J. SCHULMAN, A. VOLENICK & J. O'DANIEL, *INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPPING: POLICY, PRACTICE AND LAWS* app. III (1982).

43. Note, *supra* note 1, at 840-41. Contempt proceedings for violating a child custody order are ineffective if the abducting parent leaves the state court's jurisdiction. *Id.*

44. Hudak, *supra* note 42, at 547; Note, *supra* note 1, at 857.

45. Note, *supra* note 1, at 858-59.

46. H.R. 1977, 96th Cong., 2d Sess. (1980). The Act was passed by the House in 1979,

proposed by Senator Wallop, entitled the Parental Kidnapping Prevention Act,⁴⁷ was added by the Senate Committee on Labor and Human Resources.⁴⁸ The Wallop Amendment advocated full faith and credit treatment of child custody orders in language virtually identical to that employed in the UCCJA.⁴⁹ The full Senate passed its version of the Domestic Violence Act containing the Wallop Amendment.⁵⁰ Although the Conference Committee declined to make parental kidnapping a separate federal crime, it did modify the Wallop Amendment by permitting the Justice Department to use an already existing federal criminal statute⁵¹ to facilitate state prosecution of parental kidnapping.⁵² The House passed the Conference Report Version of the Domestic Violence Prevention and Services Act,⁵³ but the Senate tabled it on November 17, 1980.⁵⁴

An attempt later that year was more successful. The Senate passed⁵⁵ the Parental Kidnapping Prevention Act as an amendment to an unrelated bill.⁵⁶ The new legislation contained the same Wallop Amendment that had been revised by the Conference Committee to the Domestic Violence Act.⁵⁷ The House concurred in the Senate amendment,⁵⁸ and the bill became law on December 28, 1980.⁵⁹

The general purpose of the Parental Kidnapping Prevention

and was referred to the Senate Committee on Labor and Human Resources. 126 CONG. REC. S12051, 12066 (daily ed. Sept. 4, 1980).

47. S. 105, 96th Cong., 2d Sess. (1980).

48. 126 CONG. REC. S12051, 12061 (daily ed. Sept. 4, 1980).

49. Compare Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A(c)(2) (Supp. IV 1980) with UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a), 9 U.L.A. 122 (1979). The jurisdiction and full faith and credit requirements of the Wallop Amendment include the same language as the PKPA. See *infra* notes 55-58 and accompanying text.

50. 126 CONG. REC. S12051, 12066 (daily ed. Sept. 4, 1980).

51. 18 U.S.C. § 1073 (Supp. IV 1980); see also *infra* notes 118-22 and accompanying text.

52. H.R. REP. NO. 1401, 96th Cong., 2d Sess. 21 (1980).

53. 126 CONG. REC. H10400 (daily ed. Oct. 2, 1980).

54. 126 CONG. REC. S14547 (daily ed. Nov. 17, 1980).

55. 126 CONG. REC. S16506 (daily ed. Dec. 13, 1980).

56. H.R. 8406 provided medical coverage for administering pneumococcal vaccine to the elderly. 126 CONG. REC. H11673 (daily ed. Dec. 1, 1980).

57. 126 CONG. REC. S16506-07 (daily ed. Dec. 13, 1980).

58. *Id.* at H12940 (daily ed. Dec. 13, 1980), reported in 126 CONG. REC. H12497 (daily ed. Dec. 15, 1980).

59. 126 CONG. REC. 12553 (daily ed. Dec. 30, 1980). H.R. 8406 was approved by President Carter on December 28, 1980. The full faith and credit legislation (see *infra* note 110 and accompanying text) found in § 8(a) is now codified at 28 U.S.C. § 1738A (Supp. IV 1980).

Act (PKPA) is to "promote cooperation among the states in the enforcement of custody and visitation orders, discourage continuing interstate controversies and conflicts, and deter interstate abductions of children."⁶⁰ The formal purposes as set forth by Congress are contained in section 7(c) of the Act.⁶¹ Formal congressional findings used as the basis for the enactment of the Parental Kidnapping Prevention Act are set forth in section 7(a) of the Act.⁶² The measure responded to "current judicial interpretation of the full faith and credit clause of the Constitution whereby child custody orders are rendered almost unenforceable throughout the nation."⁶³

60. H.R. REP. NO. 1401, *supra* note 52, at 41.

61. Section 7(c) provides that the PKPA will:

- (1) promote cooperation between State courts
- (2) promote and expand the exchange of information . . . between States
- (3) facilitate the enforcement of custody and visitation decrees of sister States
- (4) discourage continuing interstate controversies over child custody
- (5) avoid jurisdictional competition and conflict between State courts
- (6) deter interstate abductions . . . of children undertaken to obtain custody and visitation awards.

94 Stat. 3568, 3569. These stated purposes match those found in § 1 of the UCCJA, 9 U.L.A. at 117, with the exception of purposes 3, 6, and 9 of the UCCJA which are not expressly included in the PKPA:

- (3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state. . . .
- (6) avoid re-litigation of custody decisions of other states in this state insofar as feasible. . . .
- (9) make uniform the law of those states which enact it.

Id. at 117. It is possible that incorporating these purposes into the PKPA is unnecessary since these purposes are subsumed by establishing uniform state jurisdictional standards for child custody decrees and directing that states give full faith and credit to foreign state custody decrees. See Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A (Supp. IV 1980); see also *infra* note 110 and accompanying text.

62. 94 Stat. 3566 at 3568-3569. Section 7(a) provides in part:

- (1) there . . . [are] disputes between persons claiming rights of custody and visitation . . . ;
- (2) the laws and practices . . . are often inconsistent and conflicting;
- (3) the law and practice contribute to . . . seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders . . . and interstate travel and communication that is so expensive and time consuming as to disrupt occupations and commercial activities;
- (4) among the results . . . are the failure to give full faith and credit to judicial proceedings . . . the deprivation of rights of liberty and property without due process . . . burdens on commerce . . . and harm to the welfare of children and their parents

Id.

63. 126 CONG. REC. S12061 (daily ed. Sept. 4, 1980) (remarks by Sen. Humphrey); see

The PKPA sets up a four-part scheme in seeking to fulfill its formal purposes. First, the Act directs states to give full faith and credit to valid foreign state custody decrees.⁶⁴ Second, it expands the services available under the Federal Parent Locator Service to provide for a national system for locating parents and children.⁶⁵ The Locator Service was established originally to locate parents obligated to pay child support.⁶⁶ Third, the Act⁶⁷ expands the Fugitive Felon Act,⁶⁸ used only with the Attorney General's approval, which aids enforcement of existing state parental kidnapping felony laws.⁶⁹ Finally, the Act adopts the language of the UCCJA in establishing national standards for determining proper state jurisdiction over child custody orders.⁷⁰

The congressional findings listed in section 7(a) indicate that Congress enacted the PKPA pursuant to its powers under the

also id. at S12052 (remarks by Sen. Cranston). The Wallop Amendment received strong bipartisan support.

64. Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A(a) (Supp. IV 1980); *see infra* notes 108-13 and accompanying text. *See also* U.S. CONST., art. IV, § 1.

65. Parental Kidnapping Prevention Act of 1980 § 9, 42 U.S.C. §§ 651, 653-55, 663 (Supp. IV 1980); *see infra* notes 115-18 and accompanying text.

66. 42 U.S.C. § 653 (1976).

67. Parental Kidnapping Prevention Act of 1980 § 10, 94 Stat. at 3573; *see infra* notes 118-22 and accompanying text.

68. 18 U.S.C. § 1073 (1976).

69. H.R. REP. NO. 1401, *supra* note 52, at 21-23; *see also infra* notes 118-22 and accompanying text.

70. Compare Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A(c) (Supp. IV 1980) with UNIF. CHILD CUSTODY JURISDICTION ACT, § 3(a), 9 U.L.A. at 122 (1979); *see infra* notes 124-30 and accompanying text. The jurisdictional requirements are the most important part of the PKPA. To paraphrase, the major jurisdictional provision in § 1738A(c) provides in part:

A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under [State] law . . . and (2) one of the following conditions is met:

- (A) such State is or had been the home of the child within six months prior to the commencement of proceedings;
- (B) no other State has jurisdiction and the child has a sufficient connection to the State so that the best interests of the child can be determined;
- (C) the child is physically present in the State and an emergency situation arises whereby the child is abandoned, mistreated or abused;
- (D) other States have declined to exercise custody jurisdiction and it is within the child's best interests for the State to take jurisdiction; or
- (E) the court has maintained jurisdiction pursuant to the provisions of this section.

The 48 states that have adopted the UCCJA already follow the PKPA's jurisdictional requirements. The two remaining states may still follow their own jurisdiction requirements, but they must also satisfy at least one of the jurisdictional guidelines in § 8(a) for proper custody jurisdiction.

commerce clause and section 5 of the fourteenth amendment.⁷¹ Thus, the threshold issue is whether the Parental Kidnapping Prevention Act is a constitutional exercise of congressional power.

II. THE PKPA AS A PERMISSIBLE EXERCISE OF CONSTITUTIONAL POWER

The constitutionality of the PKPA is analyzed in two parts. First, it must be shown that the legislative goals further a constitutionally legitimate end.⁷² Accordingly, support for the PKPA under the commerce clause,⁷³ and under section 5 of the fourteenth amendment⁷⁴ is discussed. Second, if a legitimate end can be found, then the means chosen—the PKPA itself—must be constitutionally permissible.⁷⁵

A. *Parental Kidnapping and the Commerce Clause*

Congress' powers under the commerce clause⁷⁶ have histori-

71. Section 7(a) provides in part:

- (1) there . . . [are] disputes between persons claiming rights of custody and visitation . . . ;
- (2) the laws and practices by which the courts . . . determine their jurisdiction . . . and the effect to be given the decisions . . . of other jurisdictions, are often inconsistent and conflicting;
- (3) those characteristics of the law and practice contribute to . . . seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders . . . and interstate travel and communication that is so expensive and time consuming as to disrupt . . . occupations and commercial activities;
- (4) among the results . . . are the failure . . . to give full faith and credit to the judicial proceedings . . . the deprivation of rights of liberty and property without due process of law, burdens on commerce . . . and harm to the welfare of children and their parents

Parental Kidnapping Prevention Act of 1980 § 7(a), 94 Stat. at 3568-69.

72. Specifically enumerated congressional powers under the constitution have been interpreted broadly since the landmark case of *McCulloch v. Maryland*, 17 U.S. (8 Wheat.) 316 (1819). In *McCulloch*, the Court construed the "necessary and proper" clause of Article I, § 8, clause 18 to include "any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable." *Id.* at 413-14. The now famous test devised by the Court is: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *Id.* at 421. Under *McCulloch*, therefore, Congress may use any ordinarily appropriate and constitutional means to implement its express powers.

73. See *infra* notes 76-92 and accompanying text.

74. See *infra* notes 93-102 and accompanying text.

75. See *infra* notes 103-46 and accompanying text.

76. The commerce clause grants to Congress the power "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3. The Supreme Court has broadly interpreted this clause since *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), by holding that

cally been interpreted broadly, and it is settled that such powers are plenary.⁷⁷ Congress is not limited to legislating in regard to commercial-economic activities under the commerce clause: in *Hoke v. United States*⁷⁸ and *Caminetti v. United States*,⁷⁹ the Mann Act's prohibition against transporting women across state lines for immoral purposes was upheld.⁸⁰ Years later, the Court in *Heart of Atlanta Motel, Inc. v. United States*,⁸¹ and *Katzenbach v. McClung*⁸² held Title II of the Civil Rights Act of 1964⁸³ a permissible exercise of the commerce clause power, because discrimination against blacks impeded interstate travel.⁸⁴ Given the Court's historical willingness to interpret the commerce power broadly in these and other cases,⁸⁵ it would seem clear that child abductions are a permissible subject for congressional legislation pursuant to that power.

The notion that parental child abduction operates within interstate commerce is amply supported. Congress concluded that child custody disputes are increasing in number because of inconsistent state laws and practices.⁸⁶ It then concluded that these conflicts lead to parental abduction of children across state lines⁸⁷ and "interstate travel and communication that is so expensive and time consuming as to disrupt . . . occupations and commercial

"[t]he power of Congress . . . comprehends [activities] within the limits of every State in the Union, so far as [those activities] may be, in any manner, connected with 'commerce . . . among the several States.'" *Id.* at 9.

77. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) ("power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.'"); *Champion v. Ames*, 188 U.S. 321, 353 (1903) ("power is plenary, complete in itself").

78. 227 U.S. 308 (1913).

79. 242 U.S. 470 (1917).

80. "The principle established by the cases is . . . that Congress has power over transportation 'among the several States'; that the power is complete in itself; and that Congress . . . may adopt . . . means . . . convenient to its exercise, and the means may have the quality of police regulations." *Hoke*, 227 U.S. at 323 (citing *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 215 (1885)).

81. 379 U.S. 241 (1964).

82. 379 U.S. 294 (1964).

83. Pub. L. No. 88-352, 78 Stat. 243-46 (codified at 42 U.S.C. §§ 2000a to 2000a-6 (1976)).

84. "Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong." *Heart of Atlanta Motel*, 379 U.S. at 257; see also *McClung*, 379 U.S. at 304.

85. See cases cited at *supra* note 77.

86. Parental Kidnapping Prevention Act of 1980 § 7(a)(2), 94 Stat. 3566, 3568; see *supra* note 71.

87. Parental Kidnapping Prevention Act of 1980 § 7(a)(3), 94 Stat. at 3569; see *supra* note 71.

activities.”⁸⁸ Among the results of these activities are “burdens on commerce.”⁸⁹ Since these activities cross state lines and impact upon interstate commerce, they fall within Congress’ power to regulate.⁹⁰ Although the legislative history contains no specific factual findings to support Congress’ conclusions,⁹¹ there is sufficient evidence to support these conclusions, and Congress can be presumed to be aware of this evidence when it enacted the PKPA.

The failure to mandate full faith and credit to child custody orders was widely criticized, and the drafting of the UCCJA underscored the need for concerted action to rectify the problem of parental child abduction. Furthermore, statistical evidence indicates that the problem of abduction is widespread and severe.⁹² Given that reservoir of evidence, it is difficult to argue that Congress’ action was hasty or uninformed.

B. *The PKPA Under Section 5 of the Fourteenth Amendment*

The PKPA is a constitutional exercise of Congressional power under the enabling language of section 5 of the fourteenth amend-

88. Parental Kidnapping Prevention Act of 1980 § 7(a)(3), 94 Stat. at 3569; *see supra* note 71.

89. Parental Kidnapping Prevention Act of 1980 § 7(a)(4), 94 Stat. at 3569; *see supra* note 71.

90. “[T]he determinative test of the exercise of power by Congress under the commerce clause is simply whether the activity sought to be regulated is ‘commerce which concerns more States than one’ and has a real and substantial relation to the national interest.” *Heart of Atlanta Motel*, 379 U.S. at 255 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824)).

91. The PKPA was originally a rider to the proposed Domestic Violence Prevention and Services Act of 1980. *See supra* notes 46–54 and accompanying text. Most of the attention, and therefore, most of the legislative history, focused on the Domestic Violence Act itself. No detailed factual findings were presented to support the PKPA because there was little opposition to it. The only significant committee discussion over the PKPA concerned whether interstate parental child abduction should be made a federal crime or whether the Fugitive Felony Act should be applied. *See* H.R. REP. NO. 1401, *supra* note 52, at 21. When the Domestic Violence Act was not passed, the PKPA was reintroduced as a floor amendment to an unrelated bill. *See supra* notes 55–59 and accompanying text.

92. Commentators often use statistics to emphasize the seriousness of child abductions. For example, Hudak states: “For every three marriages solemnized in the United States each year, one divorce is granted. In some states, the statistics approach one in two. The most pernicious and tragic aspect of a broken American marriage involving children is the custody-visitation aftermath.” Hudak, *supra* note 42, at 521. Another commentator notes: “Parental kidnapping is reaching appalling proportions. Although no precise figures are available to indicate the number of children annually kidnapped by one of their parents, conservative estimates place the number at 25,000, while other figures range as high as 100,000.” Note, *supra* note 1, at 830.

ment.⁹³ The Supreme Court has equated congressional power to enforce the thirteenth, fourteenth and fifteenth amendments (the Civil War amendments) with congressional power under Article I, section 8 of the Constitution.⁹⁴ Moreover, unlike the fifteenth amendment⁹⁵ which, by its language, is limited to racial discrimination, the fourteenth amendment encompasses a myriad of constitutional rights and is not so limited.⁹⁶

In *Katzenbach v. Morgan*,⁹⁷ the Court expanded these powers in holding that Congress may make a substantive, independent determination that discrimination has occurred to support congressional action under section 5 of the fourteenth amendment. After *Morgan*, Congress may outlaw or regulate any fourteenth amendment violations without a prior judicial determination of unconstitutionality.⁹⁸ Therefore, the Court's review is limited to a determination of whether Congress could reasonably find that the practice attacked violates a fourteenth amendment guarantee.⁹⁹

93. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

94. *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27 (1966). Although *South Carolina* dealt specifically with Congress' power under § 2 of the 15th amendment, the holding also applies to the enabling sections in the 13th and 14th amendments since the language in all three sections is virtually identical. See also *Ex Parte Virginia*, 100 U.S. 339 (1879) (exploring congressional power under the Civil War amendments, but § 5 of the 14th amendment in particular). Thus, the enabling section of the individual Civil War amendments allows Congress to enact any appropriate legislation to uphold the 13th, 14th, and 15th amendment guarantees.

95. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

96. See *University of Cal. Regents v. Bakke*, 438 U.S. 265, 292-94 (1978) (Powell, J., concurring).

97. 384 U.S. 641 (1966). In *Morgan*, the Court held Congress may prohibit discriminatory New York voter literacy tests which precluded eligibility for Puerto Ricans. Although *Morgan* involved a 14th amendment equal protection violation remedied through § 5, the case did not limit Congress' power to enforce the 13th and 15th amendments.

98. *Id.* at 648.

99. The Court emphasizes in *Morgan* that congressional action under § 5 of the 14th amendment will be given great deference:

Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirements . . . constituted an invidious discrimination in violation of the Equal Protection Clause.

Id. at 655-56 (citations omitted).

Although the Court has hinted that limits exist upon congressional § 5 powers, these limits remain vague. See *Oregon v. Mitchell*, 400 U.S. 112 (1970). At issue in *Oregon v.*

The PKPA is based on the congressional finding that inconsistent state laws governing child custody disputes deny fourteenth amendment due process guarantees to the parties involved.¹⁰⁰ This substantive determination by Congress is a reasonable conclusion immune from constitutional attack despite the Court's previous failure to squarely address the problems caused by inconsistent state child custody orders.¹⁰¹ Since the lack of uniform state custody jurisdictional standards denies interested parties due process protection,¹⁰² Congress has the power to enact any reasonable regulation, including national jurisdictional standards, to insure that fourteenth amendment guarantees are upheld.

C. *Legitimacy of Means Selected to Prevent Parental Kidnapping*

The PKPA's constitutionality is not ensured merely because it furthers one of Congress' enumerated powers. The means selected must also be examined because congressional legislation is permitted only if the means do not violate the Constitution.¹⁰³ The PKPA advances Congress' commerce clause and fourteenth amendment powers by regulating¹⁰⁴ enforcement of child custody orders. A constitutional issue is raised, however, because the

Mitchell was the constitutionality of the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970). The most controversial provision was reducing the voting age from 21 to 18 years of age. Congress determined that persons between 18 and 21 years of age are denied due process and equal protection if they are denied the right to vote. Voting Rights Act Amendments of 1970, § 301, 84 Stat. at 318. The Supreme Court, however, has never decided a case involving the constitutional rights of persons in this age group. Although four opinions joined by eight Justices discuss the impact of *Morgan*, none received majority support. The Court decided, 5-4, to uphold the 18 year-old vote for federal elections only. Four Justices argued that *Morgan* does not empower Congress to reduce the voting age in any election. *See* 400 U.S. at 204-05 (Harlan, J. concurring in part and dissenting in part). Four other Justices held that *Morgan* gives Congress full power to reduce the voting age in all elections. *See id.* at 248 (Brennan, J., dissenting from the judgments in part and concurring in the judgments in part). The deciding vote was based solely on federalism concerns. *Id.* at 119-24 (opinion of Black, J.). *Oregon*, therefore, is inconclusive at best.

100. Parental Kidnapping Prevention Act of 1980 § 7(a)(4), 94 Stat. 3566, 3569.

101. *See supra* notes 21-35 and accompanying text.

102. Without uniform state custody jurisdiction standards, a parent can easily obtain a favorable custody decree in a sister state while the other parent can be denied both an opportunity to be heard and to enforce an existing custody order. Conservative estimates place the number at 25,000, while other figures range as high as 100,000. Note, *supra* note 1, at 830.

103. *See McCulloch v. Maryland*, 17 U.S. (8 Wheat.) 316, 421 (1819); *see also supra* note 72.

104. Regulation is defined as: "The act of regulating; . . . Rule of order prescribed by superior or competent authority relating to action of those under its control. Regulation is

PKPA regulates a subject which has been traditionally supervised by the states.

Congressional regulation may, of course, be an unconstitutional exercise of power if it impinges upon state sovereignty; that is the limitation of *National League of Cities v. Usery*.¹⁰⁵ The *National League of Cities* holding emphasized that under the tenth amendment,¹⁰⁶ Congress is not free to substitute its determinations for that of the states in areas of traditional state governmental functions.¹⁰⁷

1. *Full Faith and Credit*

The PKPA's requirement that states give full faith and credit¹⁰⁸ to another state's valid¹⁰⁹ custody orders¹¹⁰ is constitutionally permissible. Despite their apparent qualification under

rule of order having the force of law issued by executive authority of government. BLACK'S LAW DICTIONARY 1156 (5th ed. 1979).

105. 426 U.S. 833 (1976). In *National League of Cities* the Court held that the 10th amendment state sovereignty guarantee exempted the states from complying with the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1976). Congress, therefore, cannot compel a state to pay its employees a federal minimum wage. Citing federalism concerns, the Supreme Court stated that Congress could not regulate a state's plenary authority over matters essential to its separate and independent existence. *Id.* at 840-46; see also Kilberg & Fort, *National League of Cities v. Usery: Its Meaning and Impact*, 45 GEO. WASH. L. REV. 613 (1977); Note, *Constitutional Law—Commerce Clause—The Reaffirmation of State Sovereignty as a Fundamental Tenet of Constitutional Federalism—National League of Cities v. Usery*, 18 B.C. IND. & COM. L. REV. 736 (1977). But see Schwartz, *National League of Cities v. Usery—The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115 (1978); Comment, *Constitutional Law—Commerce Power Limited to Preserve States' Role in Federal System*, 30 RUTGERS L. REV. 15 (1976); cf. *National League of Cities*, 426 U.S. at 856 (Brennan, J., dissenting) ("[T]here is no restraint based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution"); *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (Holmes, J., dissenting) ("[C]onstitutional powers [cannot] be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.").

106. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The *National League of Cities* majority interpreted the 10th amendment as reserving the power of state sovereignty to the states. Professor Tribe, however, views this interpretation as erroneously broad, claiming the 10th amendment only establishes a state's right to control services to its citizens. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

107. 426 U.S. at 839.

108. "Full Faith and Credit shall be given in each State to the . . . Judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such . . . Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

109. A child custody order is valid only if the jurisdictional requirements set forth in section 8(a) are met. 94 Stat. at 3570; see also *supra* note 70 and accompanying text.

the rubric of "judicial proceedings," child custody orders were not traditionally accorded full faith and credit effect.¹¹¹ The PKPA's directive, however, is not a legislative attempt to override present judicial limitations to child custody orders.¹¹² Congress has the express power under the full faith and credit clause to prescribe the effect to be accorded to a foreign state's valid acts, records and judicial proceedings. Mandating full faith and credit to child custody orders, although arguably paternal,¹¹³ is constitutionally proper. Congress, therefore, is merely clarifying and defining the effect to be given child custody orders under the full faith and credit clause.

2. *Federal Parent Locator Service*

The expansion of the Federal Parent Locator Service¹¹⁴ is also constitutionally permissible. Congress originally established the Federal Parent Locator Service to help states locate parents who

110. Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A (Supp. IV 1980) reads in part:

(a) The appropriate authorities of every state shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State. . . .

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State if—

- (1) it has jurisdiction to make such a child custody determination; and
- (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

Id.

111. *See, e.g.,* Holm v. Shilensky, 388 F.2d 54 (2d Cir. 1968) (divorce decree if subject to modification in rendering state, subject to modification elsewhere); Hendrix v. Hendrix, 160 Conn. 98, 273 A.2d 880 (1970) (child support decree if subject to modification in rendering state, subject to modification elsewhere); Currie, *supra* note 40; Ratner, *supra* note 40; *see also supra* notes 23–35 and accompanying text.

112. The PKPA does not expressly overrule the previously discussed Supreme Court cases. *See supra* notes 21–35 and accompanying text. Congress simply states that the full faith and credit clause applies to valid custody orders despite the Court's previous avoidance of that result. *See infra* notes 149–75 and accompanying text. Through the PKPA, Congress has clarified the full faith and credit clause so that it may be applied without apprehension. This congressional assurance, however, has not produced positive results. *See supra* notes 176–78 and accompanying text.

113. The measure is paternal if it is assumed that child custody orders are not granted proper full faith and credit under the Constitution. Congress seems to be reprimanding the states for refusing to carry out their constitutional directive:

The judges of the state courts are not only sworn to support the Constitution, like other state officers, but are bound also to observance of federal law by the special direction of the supremacy clause. This may on occasion require then, specifically and affirmatively, to enter a particular judgment as in complying, for example, with the injunction of the full faith and credit clause

Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 516 (1954).

114. 42 U.S.C. § 653 (1976).

had violated child support orders.¹¹⁵ The PKPA expands the Federal Parent Locator Service so that states may use it similarly to locate a parent who has abducted a child whether or not a support order is involved.¹¹⁶ The service is not mandatory and a state can elect not to participate.¹¹⁷ Thus, the expansion of the Federal Parent Locator Service is not a regulation at all. It is simply a congressional attempt to aid states attempting to fight parental child abductions.

3. *Fugitive Felon Act*

Congress' decision to expand the Fugitive Felon Act¹¹⁸ is not constitutionally objectionable. The Act, which makes interstate flight to avoid prosecution a federal offense, was deemed constitutional.¹¹⁹ It is designed merely to help the states enforce existing state felony statutes.¹²⁰ The federal statute is invoked only if the state from which the parent fled with the child has a statute making parental abduction a felony.¹²¹ The fleeing parent is deemed a federal felon by crossing state lines to avoid a state prosecution for child abduction. The federal statute is not mandatory—states can decline to use its provisions by not making parental child abductions a felony.¹²² Expanding the existing Fugitive Felon Act to

115. 42 U.S.C. §§ 651, 653 (1976).

116. Parental Kidnapping Prevention Act of 1980 § 9(b)-(c), 42 U.S.C. §§ 655, 663 (Supp. IV 1980).

117. 42 U.S.C. §§ 653, 654 (1976). A state may use the Parent Locator Service by entering into an agreement with the Secretary of Health and Human Services. The state may then, on the parent's behalf request that the Secretary furnish available information on the abducting parent's whereabouts.

118. 18 U.S.C. § 1073 (1976).

119. *Lupino v. United States*, 185 F. Supp. 363 (D. Minn. 1960), *appeal dismissed*, 285 F.2d 429 (8th Cir.), *cert. denied*, 365 U.S. 824 (1961). For a similar conclusion under a previous Fugitive Felony Act, see *Hermans v. Mathews*, 6 F.R.D. 3 (D.D.C. 1946); *Simmons v. Zerbst*, 18 F. Supp. 929 (N.D. Ga. 1937); *United States v. Miller*, 17 F. Supp. 65 (W.D. Ky. 1936).

120. *Middlemas v. District Court*, 125 Mont. 310, 283 P.2d 1038 (1951) (purpose of Federal Fugitive Act is to assist in apprehending fugitives). For a similar analysis under a previous Fugitive Felony Act, see *Hemans v. United States*, 163 F.2d 228 (6th Cir.), *cert. denied*, 332 U.S. 801, *reh'g denied*, 332 U.S. 821 (1947); *United States v. Brandenburg*, 144 F.2d 656 (3d Cir. 1944).

121. 18 U.S.C. § 1073 (1976). "Whoever moves or travels in interstate . . . commerce with intent . . . to avoid prosecution . . . under the laws of the place from which he flees, for a crime, or an attempt to commit a crime . . . which is a felony under the laws of the place from which the fugitive flees . . ." 18 U.S.C. § 1073 (1976). In addition, "[v]iolations of this section may be prosecuted only . . . upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated." *Id.*

122. *See id.*

encompass parental abductions, therefore, does not violate the Constitution since it imposes no potentially impermissible duty upon the states.

4. *Jurisdiction*

Establishing national standards for proper state child custody jurisdiction is the final means selected by Congress under the PKPA. The jurisdictional guidelines set forth in section 8(a) are virtually identical to those in the Uniform Child Custody Jurisdiction Act.¹²³ Although the jurisdictional requirements in section 8(a) present no problems for the forty-eight states which have adopted the UCCJA,¹²⁴ constitutional difficulties do arise for the remaining two states because, along with their own laws defining child custody jurisdiction,¹²⁵ they must satisfy additional requirements to possess proper jurisdiction under the PKPA.¹²⁶ Full faith and credit will not be given to any child custody order if the court issuing that order lacks jurisdiction. The PKPA, therefore, effectively mandates all fifty states to follow the UCCJA jurisdictional requirements.

There is little doubt that the establishment of national child custody jurisdictional standards is a regulation of traditionally state-supervised activities. Domestic relations law, of which child custody is a part, is within the complete domain of the states.¹²⁷ The PKPA, however, clearly mandates state compliance to strict jurisdictional requirements. Unless these requirements are met, proper state child custody jurisdiction is not satisfied and any custody orders issued by a court in that state are invalid. Establishing national jurisdictional standards as a means to stop parental child abduction, therefore, is a regulation which arguably impinges upon local, intrastate activities.¹²⁸ Congress may regulate intrastate activities, however, if the regulation both rationally relates to a constitutional goal and avoids infringement of state

123. See *supra* note 49 and accompanying text.

124. See *supra* note 45 and accompanying text. Problems could arise, however, if any of these 48 states decides to repeal the UCCJA. The jurisdictional requirements of the PKPA would still force those states effectively to follow the UCCJA.

125. Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A(c)(1) (Supp. IV 1980).

126. *Id.* § 8(a), 28 U.S.C. § 1738A(c)(2) (Supp. IV 1980); see also *supra* note 70 and accompanying text.

127. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1974); *McCarty v. Hollis*, 120 F.2d 540, 542 (10th Cir. 1941).

128. See *supra* note 127 and accompanying text.

sovereignty.¹²⁹

a. *Relationship Between Custody Jurisdiction and Child Abductions.* The regulation of intrastate activities is permitted if the activity substantially affects interstate commerce and the regulation is rationally related to a constitutionally desired goal.¹³⁰ Congressional regulation of intrastate activities under the commerce clause has long been constitutionally permissible if the necessary and proper clause¹³¹ is satisfied.¹³²

The issue, therefore, is whether national jurisdictional standards will help reduce interstate child abductions. The answer is clearly in the affirmative. When the UCCJA was enacted, the National Conference of Commissioners on Uniform State Laws noted that the Act's effectiveness and efficiency depended on unanimous adoption and use by the states.¹³³ Commentators emphasized that although the UCCJA is a positive attempt toward ending child abductions, concerted state action is necessary¹³⁴ and federal legislation essential¹³⁵ to finally eliminate parental child abduction. Since there was a recognized need for uniform state child custody laws before Congress acted,¹³⁶ the selection of national jurisdictional child custody standards as a means to end interstate child abduction is indeed rational, necessary, and proper.

b. *Custody Jurisdiction Standards and State Sovereignty.* Mere congressional regulation of a traditional state function is insufficient to render the regulation unconstitutional under the tenth amendment.¹³⁷ Thus, even if the regulation is aimed at the

129. See *infra* notes 130-46 and accompanying text.

130. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); *United States v. Darby*, 312 U.S. 100, 118 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

131. U.S. CONST. art. I, § 8, cl. 18.

132. *Houston E. & W. Tex. Ry. Co. v. United States* (Shreveport Rate Case), 234 U.S. 342, 350-52 (1914); *Champion v. Ames* (Lottery Case), 188 U.S. 321, 355 (1903) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

133. UNIF. CHILD CUSTODY JURISDICTION ACT, Commissioners' Prefatory Note, 9 U.L.A. at 114.

134. Ehrenzweig, *supra* note 36; Fleck, *supra* note 44; Foster & Freed, *supra* note 42.

135. Bodenheimer, *supra* note 3; Hudak, *supra* note 42.

136. See *supra* notes 133-35 and accompanying text.

137. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). *Hodel* involved the Surface Mining Control and Reclamation Act, which established uniform minimum nationwide standards for surface mining. The Court held that the Act was constitutional under the commerce clause. The Court held *National League of Cities* inapplicable since only regulated private individuals and businesses were regulated, not the states. *Id.* at 286.

"States as States,"¹³⁸ and addresses matters which are unquestionably attributes of state sovereignty,¹³⁹ it is constitutionally permissible unless it directly impairs the states' ability to perform traditional state governmental functions.¹⁴⁰ To fail the tenth amendment test, the regulation must leave the state no choice but strict compliance in areas which it previously had complete freedom.

In *National League of Cities*,¹⁴¹ direct displacement of state authority over its public employees occurred because the Fair Labor Standards Act (FLSA) required the states to pay federal minimum wages to its public employees. The Supreme Court acknowledged that it was perhaps desirable for state employees to receive federal minimum wage and overtime benefits, but stated that the burden placed upon the states to comply with the federal requirements far outweighed any conceivable benefit.¹⁴² The states' authority to structure and maintain integral governmental operations as it desired was destroyed because the states were compelled to observe the same minimum wage standards as private employers. After characterizing state government operations as an integral part of state sovereignty, the Court concluded that the FLSA displaced the states' ability to structure employer-employee relationships, since states were prevented from hiring employees on the states' own terms.¹⁴³ In addition, the states would be compelled to choose between increasing revenue to pay present employees the required wages and reducing the number of employees so that in-

Hodel gave the Court the opportunity to clarify the *National League of Cities* holding. The *Hodel* Court stated three requirements which must be satisfied before congressional commerce clause legislation can be invalidated under *National League of Cities*:

First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal legislation must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

452 U.S. at 287-88 (citing *National League of Cities*, 426 U.S. at 845, 852, 854); see also *infra* notes 138-39 and accompanying text.

138. *National League of Cities* emphasized that "the States as States stand on quite a different footing than an individual or corporation when challenging the exercise of Congress' power to regulate commerce." 426 U.S. at 854. When a state rather than an individual or corporation challenges Congress' use of the commerce clause to regulate a particular activity, therefore, the Court will allow a state greater deference because of the 10th amendment guarantee.

139. See *supra* notes 105-07 and accompanying text.

140. See *supra* note 137 and accompanying text.

141. 426 U.S. 833 (1976).

142. 425 U.S. at 850.

143. *Id.* at 851.

creased revenue would not be needed.¹⁴⁴ Directly displacing state autonomy, therefore, violated the tenth amendment.

The PKPA, however, does not abrogate state autonomy because federal regulation of state child custody jurisdiction does not directly impair the ability of a state to issue or modify child custody decrees. A state's nonjurisdictional procedural and substantive child custody laws are unaffected if the PKPA's jurisdictional and due process requirements are met.¹⁴⁵ Moreover, even if economic burden upon the state is determinative of a tenth amendment violation, the PKPA passes muster.¹⁴⁶ The imposition of federal jurisdiction standards does not require the states to spend additional revenue, nor to reorganize their present nonjurisdictional procedural and substantive law to maintain current expenditures. The limit on congressional commerce clause power expressed in *National League of Cities*, therefore, is inapplicable. The PKPA is not violative of tenth amendment protection because it does not directly displace the states' independent authority over child custody laws.

III. EFFECTIVENESS OF THE PARENTAL KIDNAPPING PREVENTION ACT

After the establishment of the PKPA's constitutionality the essential issue becomes whether it will effectively deter the interstate abduction of children by their parents.¹⁴⁷ To date, the PKPA has been neither applied nor challenged. Thus, to determine its effectiveness, this Note will compare holdings of past Supreme Court

144. *Id.* at 850.

145. See *supra* notes 123-32 and accompanying text.

146. Although the Court has discounted economic burden upon the states as a basis for *National League of Cities*, see *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 n.33 (1981), it is possible that financial considerations are all that is left of the decision. In its most recent 10th amendment case, *EEOC v. Wyoming*, 103 S.Ct. 1054 (1983), the Court held that extending the Age Discrimination in Employment Act (ADEA) to cover state and local governments does not violate the 10th amendment. *National League of Cities* was distinguished because the degree of federal intrusion was "sufficiently less serious" than in that case, *id.* at 1062, but it is difficult to believe that requiring the states to follow federal guidelines in determining when age can be used as a factor in discharging its employees is any less intrusive than requiring them to follow federal guidelines in determining what to pay its employees. If so, the only significant distinguishable factor remaining was that the ADEA "will have [n]either a direct [n]or an obvious effect on state finances." *Id.* at 1063. Moreover, one Justice argued that *National League of Cities* should be reversed. See *id.* at 1064-68 (Stevens, J., concurring).

147. Deterring interstate child abductions is one of Congress's stated purposes. Parental Kidnapping Prevention Act of 1980 § 7(c)(6), 94 Stat. at 3569.

cases with holdings which would have resulted if the PKPA had been in effect.

In *Kovacs v. Brewer*,¹⁴⁸ the Supreme Court allowed North Carolina to redetermine child custody despite an existing custody order from New York. New York originally granted child custody to the paternal grandfather,¹⁴⁹ who subsequently moved with the child to North Carolina and established residency.¹⁵⁰ New York then modified the custody decree at the mother's request and awarded custody to her. North Carolina ignored the modification and granted custody to the grandfather.¹⁵¹ The Supreme Court conceded that North Carolina need not give the New York custody order full faith and credit: if changed circumstances necessitated an arrangement different from that decreed by the New York court, the custody decree would not be *res judicata* in New York, nor, therefore, binding on the North Carolina court.¹⁵²

The identical *Kovacs* result survives under the PKPA, but the rationale is changed. New York's custody modification would not bind North Carolina notwithstanding a change in circumstances because jurisdiction is lost once custodian and child establish residency in another state.¹⁵³ A subsequent custody challenge, therefore, must originate¹⁵⁴ in the state with valid custody jurisdiction.

In *Halvey v. Halvey*¹⁵⁵ the parents married and raised a son in New York. Without the father's consent, the mother took the child to Florida, established residency, and filed for divorce and custody there. After the father brought the child back to New York, Florida granted a divorce and awarded custody to the mother. The mother filed a writ of habeas corpus in New York challenging the legality of the father's detention of the child. The New York court gave custody to the mother, but severely modified the Florida custody order.¹⁵⁶ The Supreme Court held that "so far as the Full Faith and Credit Clause is concerned, what

148. 356 U.S. 604 (1958).

149. *Id.* at 605.

150. *Id.*

151. *Id.* at 606.

152. *Id.* at 608.

153. New York does not have jurisdiction because the child no longer lives in New York. Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A(c)(2)(A) (Supp. IV 1980); *see also supra* note 70 and accompanying text.

154. Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A(f) (Supp. IV 1980); *see supra* note 110 and accompanying text.

155. 330 U.S. 610 (1947).

156. *Id.* The New York court granted custody to the mother, and granted visitation rights to the father plus the right to have the child with him during specified holidays.

Florida could do in modifying the decree New York may do."¹⁵⁷

The Court in *Halvey* was concerned that Florida was without power to render a valid custody decree because the father was not present nor was evidence presented on his behalf.¹⁵⁸ The Court seemed to imply that either New York or Florida could modify the original decree once the father presented his side of the controversy.¹⁵⁹

The PKPA would have eased the Court's dilemma. The Florida court had unquestioned jurisdiction to determine the custody of the Halvey child since both mother and child had lived in Florida for over six months before the mother filed the divorce and custody suit.¹⁶⁰ Since Florida had proper jurisdiction, New York could not hold simultaneous jurisdiction notwithstanding the father's New York residence.¹⁶¹ The child's presence in New York would be irrelevant since the PKPA requires the child to live in the rendering state for six months.¹⁶² Because this residency requirement was not satisfied, New York could not render a new custody order or modify an existing order. Thus, under the PKPA, the holding in *Halvey* would be incorrect. The Florida custody decree would have to be given full faith and credit by the New York courts.

In *May v. Anderson*,¹⁶³ the Supreme Court held that a state custody decree is invalid unless in personam jurisdiction exists over both parents.¹⁶⁴ In *May*, a husband and wife raised three children in Wisconsin. After marital problems developed, the wife agreed to take the children with her to Ohio. The father filed a divorce and custody suit one month later in Wisconsin. The mother was served through personal delivery of summons and petition pursuant to the Wisconsin divorce statute. When the mother did not appear, the divorce was granted and custody was awarded to the father. The children returned to Wisconsin and lived with their father for four years. During a visit in Ohio, the

157. *Id.* at 614.

158. *Id.* at 613.

159. *Id.* at 614.

160. See Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A(c)(2)(A) (Supp. IV 1980).

161. Since the PKPA, like the UCCJA, adopts the established home principle to child custody jurisdiction, simultaneous jurisdiction in different states is precluded.

162. Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A(c)(2)(A) (Supp. IV 1980); see *supra* note 70 and accompanying text.

163. 345 U.S. 528 (1953).

164. *Id.* at 533.

mother refused to surrender the children. The father then sought to enforce the Wisconsin custody decree in Ohio.¹⁶⁵

The Supreme Court believed that in personam jurisdiction over the mother, regardless of the children's legal domicile, was a prerequisite for a valid custody order.¹⁶⁶ Wisconsin could not have proper custody jurisdiction without personal jurisdiction over the father, notwithstanding the children's legal residence in Wisconsin. The Court, therefore, held the Wisconsin custody decree invalid because Wisconsin lacked jurisdiction.¹⁶⁷

Under the PKPA, Wisconsin would have jurisdiction to determine custody because the children resided there six months prior to the custody suit. Moreover, the children stayed with their mother in Ohio less than six months before returning to Wisconsin under a valid custody order. Finally, the children remained in Wisconsin with their father for four years before the custody dispute arose.¹⁶⁸

Under section 8(a) of the PKPA, only Wisconsin would have proper jurisdiction.¹⁶⁹ The Wisconsin custody order would be valid and enforceable in Ohio because the children were Wisconsin residents for well over the requisite six-month period. Under the PKPA, lack of personal jurisdiction over the mother is irrelevant in determining proper custody jurisdiction.¹⁷⁰

In *Ford v. Ford*,¹⁷¹ a Virginia court granted a divorce and dismissed the custody suit when the husband and wife reached a mutual custody agreement. The father had custody of the children during the school year; the mother had custody during summer vacation. The mother and children moved to South Carolina, where she was granted custody of the children. The father objected, but the Supreme Court held that South Carolina was not bound by Virginia's dismissal order since it was not a final judgment in Virginia.¹⁷²

165. *Id.*

166. *Id.* at 533.

167. *Id.* at 534.

168. *Id.* at 530-31.

169. Parental Kidnapping Prevention Act § 8(a), 28 U.S.C. § 1738A(c)(2)(A) (Supp. IV 1980); see *supra* note 70 and accompanying text.

170. The PKPA is primarily concerned with the welfare of children suddenly caught in the turmoil of their parents' divorce. The established home principle to jurisdiction in the PKPA emphasizes the child's residence rather than the parents'. The focus, therefore, is on the child's connection with the state and not the state's connection with the battling parents. Ratner, *supra* note 39, at 815-23.

171. 371 U.S. 187 (1962).

172. *Id.* at 192, 193. The Court suggests that the dismissal order might have been bind-

The PKPA would disallow the *Ford* result, notwithstanding the unenforceability of a voluntary custody agreement.¹⁷³ South Carolina simply would not have jurisdiction to modify the Virginia custody arrangement. Virginia would continue to have jurisdiction because the children were visiting their mother in South Carolina only during the summer months. Thus, they would not be residents of South Carolina for more than six months.¹⁷⁴ Only Virginia, therefore, would have jurisdiction to modify the custody decree and the South Carolina custody modification would be clearly invalid.

Webb v. Webb,¹⁷⁵ illustrates another jurisdictional aspect of the PKPA. The father took the child to Georgia, notwithstanding the existence of a valid Florida custody order, when he learned that the child was left without adult supervision for one weekend. After a Georgia court granted custody to the father, the mother filed suit, arguing that Georgia must give full faith and credit to the Florida custody decree. The Supreme Court found that it lacked jurisdiction since the mother failed to raise her claim properly.¹⁷⁶

The *Webb* decision came six months after the PKPA was enacted; however, the Court evaded the full faith and credit issue on a mere technicality of pleading. Under the PKPA, the result would hinge simply on whether the father justifiably removed the child from Florida. If an emergency situation warrants the father's actions, the Georgia court has jurisdiction to determine custody notwithstanding the Florida judgment.¹⁷⁷ If the father's

ing if the Virginia trial judge had thoroughly investigated the propriety of the parents' private agreement. *Id.* at 194.

173. " 'Custody determination' means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications." Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A(b)(3) (Supp. IV 1980).

174. Under § 1738A(c)(2)(A) the child must reside in the state six months prior to filing of a custody suit. In addition, § 1738A(c)(2)(E) allows a state to maintain custody jurisdiction by continuing to satisfy one of the other provisions in § 1738A(c)(2)(A)-(D).

175. 451 U.S. 493 (1981). This case also calls into question the UCCJA's ability to prevent parental child kidnappings. The kidnapping occurred after both Georgia and Florida had enacted the UCCJA. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. SUPP. at 15 (1983).

176. Although the mother had made reference to "full faith and credit," she nowhere cited the federal Constitution, nor was the existence of any federal question asserted. *Id.* at 495-96.

177. A state has proper jurisdiction under § 1738A(c)(2)(C) if the child is physically present in the state and has been abandoned, mistreated or abused. This provision would

actions were not justifiable, Georgia would lack jurisdiction and the Florida decree would stand.

In sum, the PKPA is effective. Its provisions clearly state the requirements for jurisdiction over a custody dispute. If these requirements are not met, the state lacks jurisdiction¹⁷⁸ and must give full faith and credit to any previous custody order validly issued by a sister state.¹⁷⁹ Randomly issued or modified child custody orders are avoided. The PKPA will undoubtedly reduce child abductions since parents will be unable to obtain hasty and ill-considered custody orders in another state. At the same time, it recognizes the need for custody modifications for changed or emergency circumstances.¹⁸⁰ The PKPA, therefore, permits custody modification when it is in the children's best interests.¹⁸¹

IV. CONCLUSION

Commentators have long suggested federal legislation to resolve interstate child custody disputes.¹⁸² Supreme Court decisions merely underscored the confusion surrounding the legal effect of child custody orders.¹⁸³ Moreover, the UCCJA was not completely effective.¹⁸⁴

The PKPA seeks to deter parental child abductions by promoting cooperation among the states regarding child custody orders.¹⁸⁵ By establishing national standards, the PKPA determines whether a state possesses adequate jurisdiction to render or modify a child custody order.¹⁸⁶ The PKPA also directs states to give full faith and credit to valid foreign state custody decrees.¹⁸⁷ Finally, the PKPA expands the Federal Parent Locator Service¹⁸⁸

have allowed the Georgia court in *Webb* to exercise custody jurisdiction if a pending emergency had prompted the father's actions. See *supra* note 57 and accompanying text.

178. Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A(c) (Supp. IV 1980).

179. *Id.* § 8(a), 28 U.S.C. § 1738A(a) (Supp. IV 1980).

180. *Id.* § 8(a), 28 U.S.C. § 1738A(c)(2)(C) (Supp. IV 1980); see also *supra* note 70 and accompanying text.

181. Cf. Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A(f) (Supp. IV 1980) (jurisdictional requirements of section 8(a) are tailored to serve child's best interests; modification provisions incorporate those requirements).

182. See *supra* note 50 and accompanying text.

183. See *supra* notes 23-35 and accompanying text.

184. See *supra* notes 42-45 and accompanying text.

185. See *supra* note 60 and accompanying text.

186. See *supra* note 70 and accompanying text.

187. See *supra* note 64 and accompanying text.

188. See *supra* notes 65-66 and accompanying text.

and the Fugitive Felon Act.¹⁸⁹ Both of those measures aid the states in their individual fight against parental child abductions.

The Parental Kidnapping Prevention Act is a constitutional exercise of congressional power under Article I, section 8, and section 5 of the fourteenth amendment.¹⁹⁰ Thus, the Supreme Court should readily apply the statute since it sets clear guidelines for interstate child custody disputes. Finally, the Parental Kidnapping Prevention Act is an effective solution to a pressing problem. The PKPA prohibits randomly issued or modified child custody orders¹⁹¹ and should reduce child abductions by parents wishing to obtain favorable out-of-state custody orders. The PKPA's fundamental purposes, therefore, is fulfilled.

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189. *See supra* notes 67-69 and accompanying text.

190. *See supra* notes 73-146 and accompanying text.

191. *See supra* notes 147-81 and accompanying text.